disagreed with the holding that Dean Carter was entitled to qualified immunity, on the ground that "*Hazelwood* did not change th[e] well-established rule" that "university administrators could not require prior review of student media or otherwise censor student newspapers." Pet. App. 21a-22a.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's criteria for a grant of certiorari.

As a threshold matter, the petition is internally, and fatally, inconsistent. Even though petitioners insist (as they did in the courts below) that the law was "clearly established" (Pet. 20), they now contend that confusion abounds in the lower courts about if and how *Hazelwood* applies in post-secondary schools (Pet. 23-29). This latter argument necessarily means that petitioners cannot plausibly quarrel with the Seventh Circuit's holding that Dean Carter was entitled to summary judgment on qualified immunity grounds under *Saucier*'s second prong.

Another reason to deny the petition is that this case presents a particularly poor vehicle for addressing if and how the *Hazelwood* standard applies in post-secondary schools. Here, the Seventh Circuit *agreed* with petitioners that a reasonable jury could conclude that *Innovator* was a designated public forum, so the court did not apply the *Hazelwood* standard to it. Under these circumstances, what petitioners seek is this Court's advice about the Seventh Circuit's observations concerning if and how *Hazelwood* might apply to a non-public forum, which the court expressed when addressing the first *Saucier* prong and which were technically dicta. Though these legal questions may be interesting ones in a proper case, this Court does not grant certiorari either to issue advisory opinions or to review dicta. Moreover, even if that question were resolved in petitioners' favor, it would make no difference to the judgment here – they admit that judges disagree about the applicability of

Hazelwood to colleges.

Likewise, petitioners' (and their amici's) rank speculation that the Seventh Circuit's opinion will have dire consequences for free speech in post-secondary schools does not justify this Court's review. On the contrary, the Seventh Circuit *agreed* with petitioners' view that *Innovator* was not subject to control by GSU administrators because it was a designated public forum, and the court implied that its broad view would apply to other designated public forums, regardless of the speaker's age.

Petitioners are wrong to argue that the Seventh Circuit's use of forum analysis or its qualified immunity holding squarely conflicts with opinions by this Court and the circuit courts. No other court has held that forum analysis does not apply to post-secondary school speech. To the contrary, the Seventh Circuit's use of forum analysis here is completely consistent with its application by this Court and the circuit courts, regardless of the speaker's age or the extracurricular nature of the speech. Likewise, no opinion by this Court or a circuit court would necessarily lead that court to deny Dean Carter qualified immunity on the record here. Thus, no square conflict exists that warrants this Court's resolution.

For these reasons alone, certiorari should be denied. At bottom, however, petitioners (and their amici) seek this Court's review because they believe the Seventh Circuit wrongly held that Dean Carter was entitled to qualified immunity. As noted above, however, petitioners' admission that there is disagreement about if and how *Hazelwood* applies to post-secondary schools necessarily means that the Seventh Circuit got that dispositive and ultimate question right.

I. Given Petitioners' Concession That Judges Disagree Over If and How *Hazelwood* Applies to Colleges, They Necessarily Concede the Judgment Against Them Was Correct.

Petitioners admit, nay trumpet, the disagreement among federal judges about if and how *Hazelwood* applies to colleges. Pet. 23-29. They complain of "a host of conflicting analyses," multiple dissenting opinions, and the need for two *en banc* opinions in cases concerning post-secondary school speech. Pet. 23. This argument, however, fatally undermines their contention that Dean Carter was not entitled to qualified immunity. *See, e.g.*, Pet. 20. Because they concede that the law is not "clearly established" today, they necessarily agree that the law was not clearly established in 2000. Thus, they perforce concede that the judgment against them was correct. Accordingly, this Court's review is not warranted here. *California v. Rooney*, 483 U.S. 307, 311 (1987) (*per curiam)* (holding that "[t]his Court reviews judgments, not statements in opinions") (internal quotation marks omitted).

That the law governing the applicability of *Hazelwood* to Dean Carter's calls to *Innovator*'s publisher was not "clearly established" in 2000 cannot be gainsaid, as amply demonstrated by the disagreement among the twelve judges who have considered this case. In addition, the *Hazelwood* Court explicitly reserved the question of whether university officials are entitled to the same degree of deference accorded their high school counterparts when regulating a school-sponsored non-public forum. 484 U.S. at 273 n.7. As the Seventh Circuit observed, this Court does not reserve ruling on a question with a "clearly established" answer. Pet. App. 13a (citing *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999)). Similarly, if the applicability of *Hazelwood* here were "clearly established" when Dean Carter called the printer in October and November 2000, post-secondary school students and their relations to their

schools would have been more than "at least *arguably* distinguishable from their counterparts in college education" in May 2000. *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 238 n.4 (Souter, J., concurring) (emphasis added). Lastly, if the law were "clearly established" in 2000, petitioners could not argue that there is "confusion" and "uncertainty" about the law in the lower courts today. Pet. 23-29.

As an example of disagreement among judges about if and how *Hazelwood* applies to post-secondary schools, Petitioners (like the Seventh Circuit) point to *Kincaid*. Pet. 23-24. A careful reading of the Sixth Circuit's panel and *en banc* decisions demonstrates that Dean Carter is entitled to qualified immunity, for both before and after her calls to the printer in 2000, those judges disagreed about whether the evidence showed that the yearbook there was a non-public forum and what standard was applicable when regulating it.

In *Kincaid*, a university official confiscated the yearbook based on objections to its color, theme, quality, and contents. 236 F.3d at 345. Prior to Dean Carter's calls to the printer in 2000, the panel majority held that the yearbook was a non-public forum even though it was not a classroom product, which meant (under *Hazelwood*) that the university could reasonably regulate its contents. 191 F.3d at 726-29 & nn.2-3 (citing *Hazelwood*). One judge dissented from both the evidentiary ruling that the yearbook was a non-public forum and from the majority's application of *Hazelwood*'s deferential standard to it, noting that no circuit court had yet decided the question the *Hazelwood* footnote had left unanswered. *Id.* at 730 & n.1 (Cole, J., concurring in part and dissenting in part). In 2001, *after* Dean Carter's calls, the full court concluded that the yearbook was a limited public forum and that the confiscation failed both the strict scrutiny standard for content-based regulation and the reasonableness standard for time, place and manner restrictions. 236 F.3d at 347-56. Significantly, the

Kincaid court explicitly stated that its ruling "has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper." *Id.* at 348 n.6. Moreover, this opinion was not unanimous. Judge Boggs expressed his view that even in limited public forums, "some minimum standards of competence could be a reasonable 'manner' restriction." *Id.* at 358 (Boggs, J., concurring in part and dissenting in part). Judge Norris, the author of the panel decision, continued to believe that the yearbook was a non-public forum, reiterating that in such forums, regulation "need not be the most reasonable or the only reasonable limitation." *Id.* at 359 (Norris, J., dissenting) (internal quotation marks omitted).

As petitioners also note, two Ninth Circuit judges disagree about if and how the *Hazelwood* standard applies to curricular speech, in a decision that post-dates Dean Carter's calls. Pet. 24-25 (citing *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002)). There, using three different rationales, two of which addressed *Hazelwood*, the court upheld the university's right to disapprove the content of a student's thesis. Judge Graber concluded that because the thesis was curricular speech, it was a non-public forum under *Hazelwood*, so educators could apply the deferential *Hazelwood* standard and disapprove it for failure to meet legitimate academic standards. *Id.* at 944-55. Judge Reinhardt, however, interpreted *Hazelwood* as holding that school-sponsorship, not curriculum status, was determinative on the public forum question, and he believed that which standard to apply to school-sponsored college speech was an open one. *Id.* at 956-67 (Reinhardt, J., concurring in part and dissenting in part). In his view, *Hazelwood*'s deferential standard was inapplicable to the thesis, and he suggested other possible standards, stressing that "different First Amendment standards [may be] applicable in different contexts to restrictions imposed at the university level depending on both the speaker and the nature of the particular forum" and the

importance of "distinguish[ing] student speech from university speech . . . and the speech of private individuals using the university's facilities." *Id.* at 960-64 (Reinhardt, J., concurring in part and dissenting in part). The third judge concluded that the speech was deceptive and thus not entitled to First Amendment protection. 308 F.3d at 955-56 (Ferguson, J., concurring in part).

Put simply, *Kincaid* and *Brown* (and the lower court's rulings here) convincingly demonstrate that judges disagreed even after Dean Carter's calls to the printer about if and how *Hazelwood* applies to post-secondary schools. In light of these disagreements, the *Hazelwood* Court's reservation of the question, and the lack of a Seventh Circuit opinion on this point heretofore, Dean Carter is entitled to qualified immunity.

II. This Case Is a Poor Vehicle For Determining If and How *Hazelwood* Applies to Post-Secondary Schools.

However interesting and important may be the question of if and how *Hazelwood* applies to post-secondary schools, this case is not the right vehicle for resolving that question, on at least two grounds. One is that what petitioners want is this Court's advice about the Seventh Circuit's reasons for holding in their favor on the merits (*i.e.*, the first *Saucier* prong). Even if this Court were to "reverse" that reasoning, reversal would be without any effect on the court's ultimate qualified immunity holding (*i.e.*, the second *Saucier* prong). The other reason this case is a poor vehicle for addressing *Hazelwood*'s applicability to non-public forums at colleges is that petitioners' speculation about the dire consequences of the Seventh Circuit's reasoning are premature at best. Nothing in the opinion indicates that courts will be more likely to hold that a college forum is non-public in nature (and thus subject to *Hazelwood*'s deferential standard) or that colleges will be more likely to impose more and greater restrictions on speech.

Here, when addressing the merits prong of Dean Carter's qualified immunity defense, the Seventh Circuit *agreed* with petitioners that a reasonable jury could conclude that *Innovator* was a designated public forum and thus "beyond the control of the University's administration."[2] Pet. App. 10a. Not surprisingly, petitioners do not ask this Court to review that holding. They also do not seek this Court's review of the Seventh Circuit's *agreement* with their argument that if a school justifies editorial control in a non-public forum based on the audience's maturity, age matters. Pet. App. 6a.

Instead, petitioners invite this Court to review just the Seventh Circuit's reasons for agreeing with them on the merits and its dicta about *Hazelwood*'s applicability to other, non-public forums. In effect, petitioners want this Court to "reverse" the Seventh Circuit's view that the *Hazelwood* standard of deference would have applied to *Innovator* if it had been a non-public forum. They also want this Court to "reverse" the court's dicta that being part of the curriculum is

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[2] To the extent that it implied that designated public forums cannot be regulated at all, the court misstated the law. Content-based regulation is permitted in a designated public forum to preserve the limited purposes of that forum. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). Moreover, even in public forums, content-based regulation is permitted when necessary if narrowly tailored to achieve a compelling government interest; in addition, certain time, place, and manner restrictions are permitted as well, so long as ample alternative channels of communication are left open. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In a designated public forum, reasonable "manner" restrictions could include "minimum standards of competence." *Kincaid*, 236 F.3d at 358 (Boggs, J., concurring in part and dissenting in part).

not a necessary condition for a non-public forum. This Court, however, does not sit to review such matters. *Bunting v. Mellen*, 514 U.S. 1019, ___, 124 S. Ct. 1750, 1754 (2004) (Scalia, J., dissenting from the denial of certiorari). Moreover, even if these matters were resolved in petitioners' favor, that ruling would make no difference to the judgment that Dean Carter was entitled to qualified immunity given that judges have continued to disagree about *Hazelwood*'s applicability to colleges even after Dean Carter's calls to the printer in 2000. Thus, no matter how interesting the petition's legal questions may be, this case is not the right vehicle for resolving them. *Belda v. Marshall*, 416 F.3d 618, 620-21 (7th Cir. 2005) (federal courts do not issue advisory opinions, no matter how interesting the question).

The other ground petitioners (and their amici) raise for granting their petition is a parade of horribles, which is based on their speculation that the Seventh Circuit's dicta will have broad effects on other courts' rulings on expressive activity. Pet. 28-29. Not one of the rulings they cite, however, concerns a college newspaper. Instead, the opinions concern completely different types of restrictions (speech codes and speech zones) and completely different types of speech (extracurricular, obviously private speech). *Id.* Petitioners likewise speculate that the decision "will surely accelerate the promulgation of such regulations across the nation." Pet. 27-29 & nn.12-13. In fact, petitioners *won* on the merits, and that ruling on the merits has "clearly established" the law for certain designated public forums in the Seventh Circuit. Thus, the effect of the Seventh Circuit's opinion is more likely to be that college papers will be found *not* to be non-public forums and thus *not* subject to *Hazelwood*'s deferential standard. Petitioners' rank speculation to the contrary is premature at best and illogical at worst. It is no reason for granting their petition.

III. The Seventh Circuit's Opinion Creates No Certworthy Conflict With Any Opinion by This Court or the Other Circuits.

Petitioners contend that the Seventh Circuit's analysis squarely conflicts with opinions from this Court and other circuit courts. Pet. 12-20. Not so. The Seventh Circuit's decision here is nothing more, and nothing less, than a straightforward application of forum analysis, and neither this Court nor any circuit court has directly rejected the use of forum analysis for college speech. Likewise, neither this Court nor any circuit has issued an opinion that would deny Dean Carter qualified immunity here. Indeed, there can be no such opinion – as petitioners themselves maintain, federal judges disagree about if and how *Hazelwood* applies to colleges.

A. The Seventh Circuit's Use of Forum Analysis Creates No Certworthy Conflict.

Under this Court's well-settled First Amendment jurisprudence, the first step when determining the degree of deference accorded to government restrictions on speech in any government-created forum is to determine the nature of that forum, even for adult speakers and audiences. *See, e.g.*, *Perry*, 460 U.S. at 45-48 (applying forum analysis to intra-school mail system for adult staff); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1984) (same, to advertising on city-owned buses); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800-06 (1985) (same, to charity drive aimed at federal employees); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-83 (1992) (same, to airport); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-82 (1998) (same, to debate on publicly-owned television station); *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 205-07 & n.3 (2003) (same, to internet access in public libraries).

Significantly, this Court applied forum analysis even to extracurricular speech in post-secondary schools before and after *Hazelwood*. In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, this Court applied forum analysis to a university policy denying religious groups the use of school facilities generally available to registered student groups.[3] Indeed, *Widmar* demonstrates that petitioners' view of students' First Amendment rights at colleges as completely unfettered is far too broad. There, this Court "recognized that such rights must be analyzed 'in light of the *special characteristics of the school environment.*'" *Id.* at 267 n.5 (emphasis added) (quoting *Tinker*, 393 U.S. at 506). *Widmar* also negates petitioners' assumption that a college paper is never a non-public forum, stressing that "a university differs in significant respects from public forums. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.*; *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (holding that "*[a]cademic freedom thrives . . . on autonomous decisionmaking by the academy itself*" as well as the exchange of ideas) (emphasis added).

In fact, this Court applied forum analysis in one of petitioners' primary authorities (*Rosenberger*, 515 U.S. 819) to a public university's denial of an application for student activity

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[3] Of additional significance here is that the *Widmar* court "doubt[ed] students could draw any reasonable inference of University support from the mere fact of a campus meeting place" in light of the more than one hundred recognized student groups at the university. *Id.* at 274 n.14. By contrast, the full title of the paper here (*Innovator, The Newspaper of Governors State University*) makes eminently reasonable an inference of GSU support.

funds for a Christian student group's newspaper, based solely on paper's Christian viewpoint. Petitioners' contention that the Seventh Circuit's decision conflicts with *Rosenberger* (Pet. 13-14) is right, but for the wrong reason. As explained above, the Seventh Circuit's view that designated public forums are outside a college's control conflicts with *Rosenberger*. 515 U.S. at 829-30 (holding that content regulation may be permissible in limited public forum to preserve purposes of that forum). However, and more significant for present purposes, *Rosenberger* supports the Seventh Circuit's views on government-subsidized speech. *Id.* at 833-34 (stressing that when the government "*subsidize[s]* transmittal of a message it favors," it "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee" because "when the State is the speaker, it may make content-based choices") (emphasis added). The same is true of *Southworth*. 529 U.S. at 228-35 (observing that university could impose mandatory activity fee program for funding extracurricular student speech, which it disclaimed, but if *extracurricular* speech were financed by tuition dollars and university were responsible for its content, "the case might be evaluated on the premise that the government itself is the speaker," because when a university speaks through its agents or employees, "the analysis likely would be altogether different") (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983)).

Like the *Widmar* and *Rosenberger* courts, circuit courts have applied forum analysis to post-secondary schools, to both curricular and extracurricular speech and to both faculty and student speech. *See, e.g.*, *Kincaid*, 236 F.3d at 356 (holding that the district court had "simply misapplie[d] well-established public forum law"); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1549 (11th Cir. 1997) (analyzing challenge to university's system of funding for student groups by concluding that funding system was limited public forum, so content could

be regulated to preserve fund's limited purposes (citing *Rosenberger*)); *Bishop v. Aronov*, 926 F.2d 1066, 1071-74 (11th Cir. 1991) (rejecting professor's challenge to restrictions on his assertions of religious beliefs and holding that "insofar as [*Hazelwood*] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends, even at the university level"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284-89 (10th Cir. 2004) (concluding that classroom was non-public forum, so officials could regulate student's classroom speech "in any reasonable manner," citing *Hazelwood,* and holding that speech was "school-sponsored" because the "imprimatur concept covers speech that is so closely connected to the school that it appears the school is sponsoring the speech'" and "[t]the 'pedagogical' concept merely means that the activity is 'related to learning'").

As these cases amply demonstrate, the Seventh Circuit's application of forum analysis to *Innovator* is fully consistent with opinions by this Court and other circuits.

B. The Seventh Circuit's Holding That Dean Carter Was Entitled to Qualified Immunity Creates No Certworthy Conflict.

As indicated in Part II above, petitioners do not contend that the Seventh Circuit's *agreement* with their view that *Innovator* was a designated public forum (and thus was not subject to GSU's regulation) creates a conflict for this Court's review. Likewise, as explained in Part I above, the disagreement among federal judges about *Hazelwood*'s applicability to post-secondary schools – which Part III of the petition concedes – necessarily means that the Seventh Circuit's holding that Dean Carter is entitled to qualified immunity can create no square conflict for this Court's review.

Petitioners nevertheless insist that the law was "consistently

clear" prior to *Hazelwood*, relying on pre-*Hazelwood* lower court cases, including district court cases. Pet. 20-22. Because *Hazelwood* explicitly reserved the question of how much deference should be accorded to college officials regulating non-public forums, the question plainly had no "clearly established" answer. Pet. App. 13a (citing *Wilson*, 526 U.S. at 614-18). Furthermore, logic dictates that a case decided before *Hazelwood* reserved this question simply cannot create any conflict about if and how the *Hazelwood* applies. As for petitioners' per-*Hazelwood* district court authorities, district court decisions cannot "clearly establish" the law (*Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995)), so any conflict with a district court ruling is surely no reason for granting this petition.

Tellingly, petitioners point to no post-*Hazelwood* opinion by this Court or any circuit court that would necessarily require a finding that Dean Carter is not entitled to qualified immunity. As the Seventh Circuit explained, the First Circuit was mistaken when it relied solely on the *Hazelwood* footnote for its holding that this Court "holds" *Hazelwood*'s approach is inapplicable to non-public forums in post-secondary schools. Pet. App. 13a (citing *Student Gov't Ass'n*, 868 F.2d at 480 n.6). *Kincaid* creates no square conflict – the Sixth Circuit explicitly stated that its *en banc* ruling about the yearbook "ha[d] no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper." 236 F.3d at 348 n.6. As for *Brown* (308 F.3d 939), the three different rationales employed there (to curricular speech) cannot be construed as creating any conflict with the Seventh Circuit's holdings here.

In sum, petitioners failed to demonstrate that the Seventh Circuit's qualified immunity ruling conflicts with any opinion by this Court or any other circuit court.

C. The Seventh Circuit's Opinion Creates No Certworthy Conflict With *Healy* and Its Progeny.

Petitioners insist that the Seventh Circuit's opinion conflicts with *Healy v. James*, 408 U.S. 169 (1972), "and its progeny." Pet. 12-20. Other than cases petitioners string-cite concerning the age and maturity of college students or broad First Amendment principles, however, they identify just two cases as *Healy*'s "progeny": *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973), and *Rosenberger*. *Id.* As explained above, the only conflict with *Rosenberger* is the Seventh Circuit's implication that designated public forums cannot be regulated at all. Likewise, the Seventh Circuit's ruling creates no conflict with *Healy* or *Papish*, both of which pre-date the forum analysis cases cited above as well as *Hazelwood*.

In *Healy*, this Court held only that a state-supported college could not deny a student group (the Students for a Democratic Society) the opportunity to place meeting announcements in the college paper and the use of campus bulletin boards and facilities merely because the college president disagreed with the groups' philosophy and had an unsubstantiated fear of disruption. *Id.* at 187-90. Though petitioners tout *Healy*'s broad general propositions about First Amendment rights (Pet. 12), *Healy* also stressed that "where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" 408 U.S. at 180 (quoting *Tinker*, 393 U.S. at 507). Certainly, *Healy* does not conflict with the Seventh Circuit's holding that a reasonable jury could conclude that *Innovator* was a designated public forum. It also does not conflict with the court's ultimate holding that Dean Carter was entitled to qualified immunity due to disagreement about *Hazelwood*'s applicability to colleges and the "cloudy" record

in this case.

Papish too creates no conflict with the Seventh Circuit's holdings on either the merits or qualified immunity. There, a graduate student was expelled for distributing an off-campus "underground" newspaper, which state university officials previously had allowed to be sold on campus, because it deemed "indecent" the content of a particular issue (a political cartoon of policemen raping the Statute of Liberty and an article containing foul language). 410 U.S. at 670 (distinguishing content-based regulation from reasonable time, place, and manner restrictions on speech and its dissemination). As this Court explained in *Hazelwood*, an off-campus newspaper is merely allowed by a school, and thus is readily distinguishable from a newspaper that is school-sponsored. 484 U.S. at 271 n.3.

Lastly, citing *Healy*, *Papish*, and *Rosenberger*, petitioners posit three arguments for why Dean Carter is not entitled to qualified immunity. Even if Part III of the petition had not argued that confusion exists about the law governing college speech, which mean that this holding was correct, not one of these arguments requires much attention.

The first is petitioners' view that the *Hazelwood* standard must apply only to high schools because this Court has drawn distinction between colleges and high schools in those three cases. Pet. 15-17. As noted above, however, the *Hazelwood* court's explicit reservation of whether the deferential *Hazelwood* standard applies to colleges' non-public forums negates this argument. Next, petitioners argue that under *Healy*, *Papish*, and *Rosenberger*, extracurricular activities are not non-public forums, so all reasonable university officials in Dean Carter's position had to know that *Innovator* was not a non-public forum due to the paper's "undisputed status as a student activity operated apart from the education curriculum and the undisputed record in this case." Pet. 17-19 & n.7. As

the Seventh Circuit's examples demonstrated, however, an extracurricular activity may be a non-public forum. Pet. App. 8a-9a. More important is that, as noted above, *Innovator*'s extracurricular status is *not* "undisputed" – according to petitioner Hosty herself, those who worked on the paper could seek class credit. Doc. 44 at Hosty dep. at 11-14. In their third argument, petitioners summarily assert that because the Seventh Circuit agreed that a reasonable jury could find *Innovator* was a designated public forum, "there is simply no principled basis" for finding that the law was not "clearly established." Pet. 20. As explained above, however, and as petitioners conceded in Part III of the petition, judges continue to disagree about the law even today, thereby demonstrating that Dean Carter was entitled to qualified immunity under the second prong of *Saucier*. *Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject [defendants] to money damages for picking the losing side of the controversy.").

In sum, there is no conflict with any ruling by this Court or any circuit that requires this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-377

In the
Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE,
AND STEVEN P. BARBA,

Petitioners,

v.

PATRICIA CARTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS MARGARET L. HOSTY, JENI S. PORCHE, AND STEVEN P. BARBA

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REPLY BRIEF OF PETITIONERS

1. The Brief in Opposition ("Opposition" or "Opp.") mischaracterizes the record below in several significant respects. First, the record does not support Respondent's contention that, as Dean of Student Affairs and Services at Governors State University, she in fact possessed apparent authority to insist on prior review of the student-operated *Innovator* newspaper as a prerequisite to its continued publication. *See* Opp. at 6. Rather, as the University's president testified, "in no sense" did any faculty member or administrator "have a right to approve" the newspaper's content prior to publication. Dep. of S. Fagan, Aug. 9, 2001, at 58:11-14. *See also* Defendants' Statement of Uncontested Facts, District Court Docket No. 36, ¶ 38 (conceding that University's written policy specified "that the staff [of the student media] will determine content and format of their respective publications without censorship or advance approval") (alteration in original). Second, there is no support in the record for Respondent's suggestion that the *Innovator* may have been published as part of the educational curriculum because academic credit theoretically "*could* be requested as compensation for working on the paper." Opp. at 1 (emphasis added). In fact, it is undisputed that Petitioners neither expected nor received any such credit and, in all respects, student participation on the *Innovator*'s staff was a voluntary, extracurricular activity unconnected to any particular course of study or classroom activity.[1] Third, the

[1] *See* Dep. of M. Hosty, Aug. 2, 2001, at 14:1-13. Such non-grade credit divorced from classroom instruction cannot reasonably be compared to the supervised production of a newspaper within the confines of an academic course of study in any event. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268 (1988) (student newspaper part of

record does not support Respondent's assertion that she was justified in insisting on prior review of the newspaper's content because its full name – "*Innovator, The Newspaper of Governors State University*" – made "eminently reasonable an inference of" University affiliation. Opp. at 17 n.3. It is, however, undisputed that, at all relevant times, the newspaper's masthead explicitly declared that it "is edited and published by the students" and that the "views expressed in" it "may not reflect the views . . . of Governors State University, and should not be regarded as such." Dep. of J. Porche, Aug. 2, 2001, Exh. 3, at 3.[2]

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curriculum where produced in journalism class "taught by a faculty member during regular class hours[,]" where "[s]tudents received grades and academic credit for their performance in the course" and where teacher "'was the final authority with respect to almost every aspect of the production and publication of [the newspaper], including its content.'") (citation omitted); *id.* at 271 (School-sponsored speech comprises "expressive activities" that "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, *so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.*") (emphasis added). The newspaper at issue in this case, in contrast, was not produced in connection with any course of instruction supervised by a member of the faculty and exhibited none of the other indicia of a curricular activity – *i.e.*, a designated course number, course description, schedule or registration code, much less a curriculum, syllabus, assignments, grading system, or testing method. In this context, Respondent's suggestion that the *Innovator*'s editors received a stipend paid from student activity fees is of no legal relevance. *See* Opp. at 1. This Court has expressly held that a university that voluntarily creates a system for funding student expression via a student activity fee "may not silence the expression of selected viewpoints" with which it disagrees. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

[2] Respondent's reference to the investigation undertaken by the Illinois College Press Association ("ICPA") is particularly inapposite, *see* Opp. at 2 n.1, since the ICPA expressly determined that *she* had "acted inappropriately, and probably illegally, with blatant disregard for

2. More significantly, Respondent's efforts to recast the record evidence cannot be reconciled with the obligation of the federal courts, on *her* motion for summary judgment, to review that evidence "in the light most favorable to the party opposing" such a motion, *i.e.*, Petitioners. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982). *See also, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 216 (2001) ("[I]f [a qualified immunity claim] turns on which of two conflicting stories best captures what happened ..., [this Court's precedents] will not permit summary judgment in favor of the defendant official. And that is as it should be.") (Ginsburg, J., concurring). In this case, "view[ing] all facts and draw[ing] all reasonable inferences in favor of" Petitioners, *Brosseau v. Haugen*, 125 S. Ct. 596, 597 n.2 (2004), the record on which summary judgment was entered establishes that Respondent imposed a viewpoint-based system of prior restraint on a student newspaper operated separate and apart from the University's curriculum by adult students and that she did so in direct response to the newspaper's criticism of her official conduct.[3]

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students' First Amendment rights" when she instructed "the paper's out-of-town printer . . . not to print any more issues of the Innovator unless she or another administrator had reviewed and approved the content." Dep. of S. Fagan, Aug. 9, 2001, Exh. 6.

[3] Indeed, that record conclusively establishes both that the University had previously and unambiguously ceded unfettered editorial control of the newspaper to its student editors, *see, e.g.*, Defendants' Statement of Uncontested Facts, District Court Docket No. 36, ¶ 38; Dep. of M. Hosty, Aug. 2, 2001, at 151:17-22 (by policy and practice, *Innovator* was "totally student-run"), and that Respondent deviated from that in direct response to published criticism of her official conduct and that of the University, *see* Dep. of J. Porche, Aug. 2, 2001, Exh. 3 (October 31, 2000 issue containing, *inter alia*, two lengthy articles, four letters to the editor, and three columns harshly critical of the University administration, including one column devoted to Respondent's performance, as well as a notice that future issues would contain similar criticism). Not

3. On this record, Respondent's primary submission – *i.e.*, although questions concerning if and how this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), applies in the college setting may be "interesting" and "important," Opp. at 13, this Court should nevertheless deny the Petition because she is entitled to qualified immunity in any event – must be rejected. Petitioners have sued Dean Carter because the conduct in which *she* engaged plainly violated "clearly established" constitutional law. Her argument to the contrary is premised on *her* contention that such misconduct may be excused because "the law governing the applicability of *Hazelwood* to Dean Carter's calls to *Innovator*'s publisher was not 'clearly established' in 2000." Opp. at 10. The issue before this Court, therefore, is precisely whether that contention – that *Hazelwood* rendered it reasonable for a public university administrator to believe that she could impose a system of viewpoint-based censorship on a student newspaper published as an extracurricular activity – can be squared with this Court's precedents construing the First Amendment's application to adult students enrolled in public universities.

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surprisingly, therefore, Respondent concedes that, immediately following the publication of these articles, she "called the [newspaper's] printer and instructed him not to print any more issues of [the] *Innovator* without first calling her so that she or someone from the administration could read and approve it." Opp. at 2. This concession belies Respondent's inaccurate assertion that Petitioner Porche cited another University entity, the Student Communications Media Board (SCMB), as the "'chief deterrent'" to future publication of the *Innovator*. *Id.* at 3 (citation omitted). In fact, Petitioner Porche testified that it was Respondent's demand for prior approval that prevented the newspaper's subsequent publication. *E.g.*, Dep. of J. Porche, Aug. 2, 2001, at 33:1-4 ("Q: Why were you not able to publish ... the papers? A: Because [Dean Carter] called our printer and said not to publish it."). *See also id.* at 60:20-23 ("Q: The SCMB doesn't prevent you from putting the paper together? A: No. . . . ").

4. Respondent is, therefore, incorrect when she asserts that Petitioners have asked this Court to "issue [an] advisory opinion[] or to review dicta," or are merely seeking "advice about the Seventh Circuit's observations concerning if and how *Hazelwood* might apply to a non-public forum." Opp. at 8. Respondent affirmatively invoked *Hazelwood* in the lower courts as *the* reason why she is entitled to qualified immunity. Respondent contends in this Court that *Hazelwood* casts doubt on the ongoing validity of "petitioners' pre-*Hazelwood* authorities." Opp. at 4. And Respondent defends the Seventh Circuit's holding that, even in the context of adjudicating *her* motion for summary judgment, "the implementation of *Hazelwood*" has caused such "legal and factual uncertainties" to "dog the litigation," that she is entitled to immunity. App. 14a; *see also* Opp. at 7. In short, Petitioners seek review of the Seventh Circuit's *ratio decidendi* – *i.e.*, its holding that *Hazelwood* has created sufficient uncertainty in the law that, on the record presented on Respondent's motion for summary judgment, it was objectively reasonable for her to believe that she could censor further criticism of her official conduct by adult students writing in a student newspaper published as an extracurricular activity. *See* App. 7a, 14a-15a.

5. In addition, there is nothing in footnote 7 of this Court's decision in *Hazelwood* that could have, as Respondent asserts, rendered such a belief reasonable. *See* Opp. at 10. Indeed, she expressly concedes that the only question this Court "reserved" in that footnote was whether "post-secondary public school officials may reasonably regulate the content and style of *school-sponsored* speech for *legitimate pedagogical purposes* in a *non-public forum*." *Id.* at i (emphasis added). That question has no bearing on the conduct at issue here – namely, the imposition by a public official of a viewpoint-based system of prior restraint on an

extracurricular student newspaper in retaliation for the newspaper's criticism of her and her colleagues.[4]

6. Respondent further contends that the Petition is "internally, and fatally, inconsistent," Opp. at 8, because it emphasizes that there is presently confusion in the lower courts concerning if and how *Hazelwood* applies to colleges and universities. Opp. at 10. To be sure, there is considerable confusion in the lower courts about *Hazelwood*'s reach and that uncertainty has been materially exacerbated by the Seventh Circuit's decision in this case. Nevertheless, Respondent was not granted immunity because she restricted the content of a newspaper produced in the context of a journalism class (*Hazelwood*), a student thesis produced as a prerequisite to earning a master's degree (*Brown v. Li*, 308 F.3d 939 (9th Cir 2002)), the curricular speech of a student in the classroom (*Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004)), or the speech of a college professor during class instruction (*Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991)). Nor did she receive immunity because – to invoke the example offered by the Seventh Circuit majority – she undertook to control the content of a college alumni

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[4] This Court has held, both before and after *Hazelwood*, that such conduct violates the First Amendment, *see Rosenberger*, 515 U.S. at 835 ("[h]aving offered to [facilitate the expression] of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints"); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that ... First Amendment protections should apply with less force on college campuses than in the community at large."), including specifically in the context of an adult student's contributions to a college newspaper, *see Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973) ("the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech").

magazine bearing the school's imprimatur. App. 8a-9a.[5] The fact that the lower courts are badly divided with respect to the deference owed by the judiciary to educators in such circumstances does not diminish the clarity with which the precedents of this Court and the courts of appeals have heretofore condemned the conduct at issue here. *See* App. 12a (citing *Saucier*, 533 U.S. at 202) (qualified immunity inquiry "must be undertaken in light of the specific context of the case"). Nor does it diminish the need for this Court's guidance now that the Seventh Circuit has added to that confusion by holding that a university administrator could reasonably conclude that she was entitled to *Hazelwood* deference when she set out to censor criticism of her official conduct contained in "an independent publication organized

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[5] It bears emphasis that, despite the confusion in the lower courts regarding the appropriate reach of *Hazelwood* in other such post-secondary school contexts, the Seventh Circuit's decision stands alone in concluding that *Hazelwood* dictates the appropriate standard for examining the constitutionality of restrictions on the extracurricular collegiate press. Indeed, Respondent expressly conceded as much during oral argument before the *en banc* court of appeals. *See* http://www.ca7.uscourts.gov. In this regard, Respondent's reliance on the panel majority's decision in *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), *rev'd*, 236 F.3d 342 (6th Cir. 2001) (en banc), is misplaced. First, that decision had already been vacated by the Sixth Circuit prior to the Respondent's conduct at issue in this case and was shortly thereafter reversed as plainly "erroneous" in an opinion joined by all but one of that court's 13 judges. *Kincaid v. Gibson*, 236 F.3d 342, 352-53 (6th Cir. 2001). Second, that case did not involve a student-operated newspaper and the Sixth Circuit therefore took great pains to emphasize that its application of forum analysis to the yearbook in question "has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper," *id.* at 348 n.6, an issue the *en banc* court recognized was governed by an imposing body of precedent holding that such conduct violates the First Amendment, *see id.* (citing *inter alia*, *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973)).

and published by students on their own time," not as "part of an academic program, but rather [as] an extracurricular activity." App. 24a (Evans, J., dissenting).

7. On this record, moreover, Respondent's newly framed contention – that she is entitled to qualified immunity because a reasonable college administrator could have concluded that the *Innovator* was a non-public forum, *see* Opp. at 16, 22-23 – cannot be credited. Simply put, there is no legitimate basis for the assertion that a college newspaper published outside the educational curriculum as an independent student activity is anything other than a public forum. Respondent conceded as much below, *see* App. 24a, a concession made necessary both by the record evidence and by this Court's decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 835 (1995). In that case, as Respondent correctly notes, the Court explained that, when the government "'subsidize[s] transmittal of a message it favors,'" the First Amendment permits it to "'take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee' because 'when the State is the speaker, it may make content-based choices.'" Opp. at 18 (quoting *Rosenberger*, 515 U.S. at 833-34). *Rosenberger* does not, however, "support[] the Seventh Circuit's views on government-subsidized speech," Opp. at 18, where, as in this case, the speech at issue is plainly critical of the government itself and the speakers do not purport to do so in the name of that government. *See Rosenberger*, 515 U.S. at 835 ("[h]aving offered to [facilitate the expression] of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints").

8. For that very reason, this case presents an ideal vehicle for the Court to address the First Amendment rights of the student press in the college and university setting. It

not only arises in the context of "criticism of official conduct," speech that goes to the "central meaning of the First Amendment," *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964), it involves "the most serious and the least tolerable infringement of First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), the imposition of a viewpoint-based system of prior restraint on a newspaper as a direct result of such criticism. The Seventh Circuit's holding that Respondent is nevertheless entitled to immunity because her conduct did not violate any "clearly established" rights affords this Court a unique opportunity to counsel both the administrators of public institutions of higher education and the lower courts concerning the First Amendment freedoms afforded the adult students who attend them.

9. Such guidance is especially warranted because the Seventh Circuit's decision has already placed those freedoms in substantial jeopardy. This is not, as Respondent claims, "speculation" that is "premature at best." Opp. at 15. To cite just one example, within ten days of its issuance, the Presidents of all of the schools in the California State University System were advised by their General Counsel that the Seventh Circuit's decision "appears to signal that [public college and university] campuses may have more latitude than previously believed to censor the content of subsidized student newspapers."[6] Petitioners respectfully submit that, especially under these circumstances, this Court should grant their Petition for a Writ of Certiorari.

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[6] Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), available at http://www.splc.org/csu/memo.pdf.

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